IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 2397 OF 1987

For Approval & Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the reporters or not ?

3. Whether their lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

KHUNGALA LABHUBHAI APPABHAI
VERSUS
RAJKOT MUNICIPAL CORPORATION & ANR.

Appearance:
MR JJ YAGNIK for petitioner
MR NIKHIL KERIL for Respondents

Coram: MR.JUSTICE S.K.Keshote,J
Date of decision:26/11/1999

C.A.V. JUDGMENT

#. The petitioner, by this writ petition under Article

226 of the Constitution of India, is praying for directions to the respondent to treat its impugned action of not regularising his services and terminating his services as illegal, unjust, arbitrary, discriminatory, unconstitutional and non-est in the eye of law and to direct the respondent to treat the petitioner in continuous services of the respondent from the date of his initial appointment in services. Second prayer has been made for directions to the respondent to regularise the services of the petitioner with all consequential benefits.

#. It is not in dispute that the services of the petitioner were terminated by respondent much before the date on which interim relief was granted by this Court. A point is raised that the respondent has committed contempt of the Court in terminating the services of the petitioner. However, from the special civil application itself, and particular prayer made in paragraph-10(A), it is clearly borne out that as per the petitioner's own case, his services were terminated by respondent before he approached to this Court. Be that as it may, the matter has to be considered on merits.

#. The learned counsel for the petitioner contended that termination of services of the petitioner is made by respondent in violation of provisions of Section 25-F, 25-G, and 25-H of the Industrial Disputes Act, 1947. It is next contended that the action of respondent to continue the petitioner as daily wager and not to regularise his services and to give him all the benefits of services which are being given to permanent employees is wholly arbitrary and unjustified.

#. The petitioner, as per his own case, was appointed as a daily wager driver and he has not stated very specifically on which date he was employed as such. However, during the course of arguments, the learned counsel for the petitioner made reference to the pleadings made by petitioner in sub-para 3 of paragraph 6 wherein it is stated that the petitioner was working continuously with respondent-authority since 1983 and that he has completed 240 days in a year.

#. In this case, the respondent has not filed reply thereto.

#. The learned counsel for the respondent orally contended that this writ petition is not maintainable as it is not admitted case of the respondent that the petitioner has completed 240 days in twelve calendar

months immediately preceding the date of termination of his services. It is a disputed question of fact and for which only adequate and appropriate remedy for the petitioner is to raise an industrial dispute. It has next been contended that the petitioner has come up with the case that the respondent has terminated his services in violation of provisions of Section 25-F, 25-G and 25-H of the Industrial Disputes Act, 1947 and for this complaint he shall to avail of the remedy provided under the very Act itself. It is contended that the petitioner was appointed as a daily wager as and when there was temporary increase of work of driver and he has no right to hold the post and not acquired any right of regularization of his services. Recruitment to the post of driver is regulated under the recruitment rules framed by the Corporation and in case daily wagers are made permanent or their services are regularised, then this will become a source of recruitment which otherwise is not provided under the recruitment rules of the Corporation. Not only this, the learned counsel for the respondent contended, that if such course is adopted and this Court has also given direction to the respondent to regularise the services of the petitioner then, it may be in violation of provisions of Articles 14 and 16 of the Constitution of India. The petitioner was engaged as a daily wager and that engagement was not made after making selection in accordance with the provisions of Articles 14 and 16 of the Constitution of India. Next, it is contended that the daily wager has no right to the post and the respondent-Corporation, when the work was not available for the petitioner, has all the right to terminate his services. Lastly, it is contended that termination of the services of the petitioner from services is legal and valid and no question does arise of regularising of his services.

#. Mr.J.J.Yagnik, learned counsel for the petitioner, in rejoinder contended that this special civil application has been admitted and after so many years of its admission, at this stage, this Court may not relegate the petitioner to the alternative remedy. It has next been contended that it is a settled law that after admission of the special civil application, normally, this Court may not dismiss the same on the ground of availability of alternative remedy. Lastly, it is contended that there is no bar under the Constitution for maintainability and entertainment of the special civil application under Article 226 of the Constitution of India by this Court, even in the cases where the petitioner, against the impugned action of respondent has an alternative remedy. On merits, again the learned counsel for the petitioner

reiterated his submissions which he earlier made.

#. I have considered the rival submissions made by learned counsel for the parties. First of all I consider it to be apropriate to deal with the the preliminary objection raised by learned counsel for the respondent, reg.: maintainability of the writ petition. The power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature and is not limited by any other provisions of the Constitution of India. This Court having regard to the facts of the case has discretion to entertain or not to entertain a writ petition. There are certain self=imposed restrictions one of which is that if an effective and efficacious remedy is available, this Court would not normally exercise its jurisdiction in the matter. However, as consistently held by the apex Court, alternative remedy available in a given case may not operate as a bar in at least three contingencies, namely where writ petition has been filed for enforcement of any of the fundamental rights or where there has been a violation of principles of natural justice or where the order or proceedings are wholly without jurisdiction or vires of the Act is challenged. The present one is not the case where vires of any Act or Rule framed thereunder has been challenged by petitioner. It is also not the case where this writ petition has been filed for enforcement of any of the fundamental rights. The action of the respondent to discontinue the services of a daily wager cannot be said to be wholly without jurisdiction. The principles of natural justice are also not violated in the present case. So this case does not fall under any of the exceptions carved out by the apex Court in the cases where direct writ petition may be entertained by this Court.

#. In this case, twofold grievances are being made by petitioner. Firstly, that his services were terminated in violation of provisions of the Industrial Disputes Act, and secondly, that his services would have been regularized. The issue of maintainability of a writ petition under Article 226 of the Constitution of India where efficacious alternative remedy is available is no more res-integra and there can be no doubt regarding the legal position that a party should ordinarily avail the statutory remedies instead of approaching Writ Court however, the alternative remedy is an adequate, efficacious, speedy and not of burdensome or onerous in character. Reference in this respect fruitfully may have to the following decision of the Apex Court.

(i) Himmat Lal Hari Lal Mehta v. State of Madhya Pradesh & Ors. - AIR 954 SC 403

(ii) State of Bombay v. United Motors India Ltd. - AIR 953 SC 252

(iii) State of U.P. v. Mohd. Nooh - AIR 958 SC 86

(iv) K.S.Rashid & Sons v. Income Tax Investigating Commissioner - AIR 954 SC 207

(v) A.B.Venkateswaran, Collector of Customs, Bombay v. Ram Chandra Shobraj Wadhwani - AIR 96 SC 506

(vi) Calcutta Discount Company Ltd. v. Income Tax Officer - AIR 1961 SC 372

##. So far as the matter pertains wherein an issue of industrial dispute is concerned, the Constitution Bench of the apex Court in the case of Basant Kumar Sarkar v. M/s.Eagle Rolling Mills, reported in AIR 1964 SC 1260, considered the matter from the point of view of availability of alternative remedy as under;

> "The High Court has held that the question as to whether the notices and circulars issued by the respondent No.1 were valid, could not be considered under Article 226 of the Constitution; that is a matter which can be appropriately raised in the form of dispute by the appellants under Section 10 of the Industrial Disputes Act ..... We would confirm the finding of the High Court that the proper remedy, which is available to the appellants to ventilate their grievance in respect of such notice and circulars is to take recourse to Section 10 of the Industrial Disputes Act....."

In the case of U.P.Jal Nigam v. N.S.Mathur, reported in (1995)1 SCC 21, the apex Court observed as under:

> "Where a statutory Tribunal has been constituted specially to look into the grievance of the Government servant, it is a statutory obligation on the part of such government servant first to avail those of the statutory remedies. in case they are aggrieved against the order passed by the Tribunal, the remedy under Article 226 is always available to them.....Under these circumstances.....it was wholly unjustified in entertaining the writ petition."

This view has been reiterated by the apex Court in the recent judgment in the case of Commissioner of Income Tax, Lucknow v. U.P.Forest Corporation & Ors., reported in (1998)3 SCC 530. In the case of Scooters India Ltd. v. Vijai E.V.Eldred, reported in (1998)6 SCC 549, the apex Court has held as under:

> "The above facts alone are sufficient to indicate that there was no occasion for the High Court to entertain the writ petition directly for adjudication of an industrial dispute involving the determination of disputed questions of facts, for which remedy under the Industrial Law was available to the workman."

Reference may also have fruitfully to the decision of the apex Court in the case of Life Insurance Corporation of India v. D.J.Bahadur reported in AIR 1980 SC 2181:

> "In determining whether a statute is special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes-so too in life. The I.D. Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of an adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the I.D. Act has one special mission - the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the I.D. Act is a special statute and the L.I.C. Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and plurality of problems which, incidentally, involve transfer of service of

existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such are beyond the orbit of and have no specific or a special place in the scheme of the L.I.C. Act. And whenever there was a dispute between workmen and management, the I.D. Act mechanism was resorted to."

##. In the case of termination of services of workmen and more so where grievance has been made that termination has been effected in violation of the provisions of the Industrial Disputes Act, 1947, normally, rule of an employee should be to avail remedy provided under the Industrial Disputes Act, 1947 and entertainment of writ petition by this Court under Article 226 of the Constitution of India without exhausting remedies should be with great care and caution and in very exceptional cases. In the case of Tin Plate Co. of India Ltd. v. State of Bihar, reported in AIR 1999 SC 74, the apex Court said that, "it is no doubt true that when an alternative and equally efficacious remedy is open to a person, he should be required to pursue that remedy and not to invoke extraordinary jurisdiction of the High Court under Article 226 of the Constitution and where such a remedy is available, it would be sound exercise of discretion to refuse to entertain the writ petition under Article 226 of the Constitution". Again, in the case of Sheela Devi v. Jaspal Singh, reported in (1999)1 SCC 209, the apex Court has taken same view. It is therefore no more res-integra and in fact it is a settled proposition of law that where adequate remedy can be read in the statute, plea of resort to remedy under Article 226 / 227 of the Constitution must be discouraged. Reference may have in this respect to two decisions of the apex Court in the case of Shyam Kishore v. Municipal Corporation of Delhi, reported in AIR 1992 SWC 2279 and in the case of Mohan Pandey v. Smt.Usha Rani Rajgaria, reported in (1992)4 SCC 61.

##. So from the ratio of these decisions it is very clear that normally direct writ petition may not be entertained by this Court under Article 226 of the Constitution of India where alternative and efficacious remedy is available to the litigant. Approach of litigants directly by circumventing alternative remedy available, to this Court is to be discouraged, more so, in cases where complaint has been made by litigant for violation of some provisions of law in making of the action impugned in the writ petition. If the efficacious alternate remedy is available in the Statute itself,it

has to be availed of . However, in exceptional cases and more so where the case falls in one of the exception as carved out by Hon'ble Supreme Court, a writ petition can be directly entertained but not as a rule or right. Substance of the matter is that question of having bar in the writ jurisdiction to entertain petition directly where alternative remedy is available may not arise as it is a settled proposition of law that judicial review in writ jurisdiction is permissible of the order of quasi-judicial authority or even of administrative order of the State Government with certain limitations which have been explained from time to time by various High Courts as well as Hon'ble Supreme Court and recently, the Hon'ble Supreme Court has said in the case of Whirlpool Corporation v. Registrar of D.M.Trade Marks, Mumbai, reported in (1998)7 SCC 243 as under:

"Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions, one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But an alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, (i) where the writ petition has been filed for the enforcement of any of the fundamental rights; or (ii) where there has been violation of the principles of natural justice; or (iii) where the order or proceedings are held without jurisdiction or the vires of the Act is challenged."

##. It is equally correct that holding an absolute bar to entertain writ petition in respect of industrial dispute may tantamount to the Court not having competence of judicial review in the order impugned in the writ petition. Judicial review of quasi=judicial, judicial or administrative orders is a basic feature of the Constitution and normally it cannot be allowed to be taken away by interpretations. Thus, it cannot be laid down or accepted as absolute rule that this Court under Article 226 of the Constitution has no power to entertain directly a writ petition in the matter where against the impugned action or order, alternative efficacious remedy is available. But self=imposed restrictions where it does not warrant exercise of such powers in the cases where statutory remedy is provided for, this Court is perfectly legal and justified in its approach not to

entertain writ petition directly. Similarly, where disputed question has to be gone into or disputed questions of fact are involved for adjudication, this Court may not entertain writ petition directly. As a rule, writ petition directly cannot be entertained by this Court though there is no statutory bar but it is a self=imposed restriction to have judicial discipline as well as to see that first the parties avail efficacious alternative remedy available.

##. The question of entertainment directly of writ petition in the category of cases to which this case belongs is normally discouraged for three reasons. Firstly, the petitioner is making grievance of violation of the provisions of Industrial Disputes Act, 1947, by respondent in taking of the action to terminate the services of the petitioner, and in such case, for redressal of this grievance, statutory remedy of raising industrial dispute under the Industrial Disputes Act, 1947, is provided. Secondly, it is a question of fact whether the petitioner has completed 240 days in twelve calendar months preceding the date of termination of his services or not. It is not an admitted fact that he had completed 240 days in twelve calendar months preceding the date of termination. To give any relief to the petitioner, the Court has to decide on this question of fact and this adjudication normally is not resorted to by this Court. So where the disputed questions of fact are there, direct writ petition should be discouraged. Whether the conditions prescribed under Section 25-F of the Industrial Disputes Act, 1947, for retrenchment of workman have been fulfilled or not in a given case is a pure question of fact and since in order to arrive at a conclusion or for recording finding, some investigation/ inquiry has to be embarked upon, this question would be beyond the purview of Article 226 of the Constitution of India. In such matters, alternate remedy may be efficacious and adequate. Lastly, raising of industrial dispute in such matters is also in favour of respondent. In such matters even if it is found that the conditions prescribed under Section 25-F of the Industrial Disputes Act, 1947, for retrenchment of workman have not been fulfilled by the employer, still the respondent has all the right to satisfy that it is not the case where the award of reinstatement with full backwages may be passed in favour of workman. This is also a pure question of fact and to arrive at a conclusion or for recording finding, certainly, investigation and/or inquiry has to be embarked upon and it is beyond the purview of Article 226 of the Constitution of India. In such matters, if directly writ petition is entertained, it will cause

serious prejudice to the respondent also. It is not the law that this aspect of the matter has to be considered only with reference to the petitioner but the Court has to consider also while directly entertaining writ petition in a matter where alternate statutory remedy is available, as to whether entertaining writ petition directly will cause any prejudice to the respondent or not. Where it is satisfied that it causes prejudice to the respondent, then it it also equally a good ground not to entertain writ petition directly.

##. Remedy provided under the Industrial Disputes Act, 1947, are not only efficacious and effective remedy but it is also a cheaper remedy. I fail to see what incentive and charm the litigants are having to approach this Court directly almost in all the matters where statutory remedies are available. It is true that there are certain exceptions which have been carved out and in those cases, this Court may relegate its self-imposed limitations in entertaining direct writ petition but in those cases also, insistence of this Court should have been to avail of the alternative remedy except in exceptional cases. Alternative remedy in this case is a cheaper remedy and secondly after decision given by the Labour Court, it is open to the party aggrieved of the decision to approach this Court. In the Labour Court or Industrial Tribunal, remedy is not only cheaper, but it is also speedy. It is not unknown to the litigants and the persons concerned with the Courts that this Court because of heavy pendency of litigations is not able to dispose of matters for years together. One of the reasons for the heavy pendency of matters may be that the parties are directly approaching this Court even in the cases where efficacious and effective alternative remedies are available. It is not gainsaid that in case the litigants come to this Court by exhausting alternative remedy, certainly it may reduce number of litigations before this Court. Out of hundred cases decided by alternative redressal forums in the State, at least in some percentage of cases the parties may be satisfied with the decision and in this way, to that extent litigation will not come before this Court. This approach of litigants to directly come to this Court in cases where statutory alternative remedies are provided is to be curbed and it is also in the larger interest of the litigants. By this indiscriminately filing of writ petition directly before this Court even in the matters where efficacious, effective alternative remedies are available results in deprival of speedy justice to those persons who have come before this Court after exhausting alternative remedies. Though at one point of time,

disposal of this special civil application would have been there but this Court could not stand to the expectation of dispensing with the speedy justice of litigants for which, as said earlier, one of the cause may be of indiscriminately filing of writ petitions before this Court by litigants even in cases where statutory remedies are available.

##. The learned counsel for the petitioner failed to give out any justification to approach this Court directly by this writ petition in the matter where a complaint has been made that termination of services has been made in violation of provisions of Section 25-F of the Industrial Disputes Act, 1947. Having heard the learned counsel for the petitioner and going through the contents of the special civil application, I am satisfied that otherwise also, this case does not fall under any of the exceptions carved out by the Hon'ble Supreme Court where direct writ petition may be entertained by this Court. It is also not a case of exceptional category where this self=imposed restriction of not entertaining writ petitions directly in the matter where statutory alternative remedies are available, may be relaxed.

##. The Industrial Disputes Act, 1947, is a special Statute enacted by Parliament for settling industrial disputes through conciliation and if not possible, then by the Tribunal or the Labour Court, as the case may be, to which the reference is made by the State Government for adjudication of the industrial dispute. Conciliation is there and it is not unknown that a good percentage of cases are being settled at the stage of conciliation. Despite of such an effective provision, I fail to see any justification and charm of the litigants to directly come to this Court by writ petition under Article 226 of the Constitution of India in these matters. Sometimes, the learned counsel for the litigants have given out justification that the Labour Court or the Industrial Tribunal have no powers to grant interim relief, but I have seen cases after cases where the Industrial Tribunals or the Labour Courts have granted and are granting interim reliefs also in appropriate cases. The Industrial Disputes Act, 1947, has a very specific purpose and object, i.e. to reduce conflict between employer and employee so as to achieve industrial growth of the country as well as peace in industry. This Act is a self-contained Code and provides complete procedure including machinery for recovering monies due from the employer to employe and reference in this respect may have to Section 33-C of the Industrial Disputes Act, 1947. It is not gainsaid that the question whether the

principles of natural justice have been complied with before passing impugned order or not is also a question of fact which requires investigation/inquiry. Similar is also the question as to whether the order is without jurisdiction or not. As also, essentially, the question of fact requires investigation before reaching conclusion and that investigation and inquiry normally are beyond the scope of Article 226 of the Constitution of India. These questions are also appropriately be agitated and adjudicated before and by the Labour Court or Industrial Tribunal after recording evidence of the parties. It is no doubt difficult to lay down conditions and/or grounds exhaustible as the facts differ from case to case which may be held as sufficient for invoking extra ordinary jurisdiction of this Court without exhausting first the alternative statutory remedy available. There cannot be a watertight compartment in such matters but normal rule in such matters it to first exhaust statutory alternative remedy available and in cases where litigant directly approaches to this Court on the threshold of the matter, this Court may insist upon the litigant first to avail of the statutory alternative remedy. At the threshold of the matter, i.e. at the stage when the matter was placed for preliminary hearing, such approach of the litigant should be discouraged by the Courts.

##. The learned counsel for the petitioner has failed to show, what to say to satisfy this Court, how any prejudice will be caused or the petitioner will be deprived of any of his rights, substantial or procedural right, in case where he would have first gone to the Labour Court or the Industrial Tribunal, as the case may be. It is understandable that where alternative remedy is onerous one, litigant may have some semblance of justification to come up before this Court directly, but that is not the case here. At the cost of repetition, I have to state that remedy before the Labour Court is not only cheaper but is also speedy. The Industrial Disputes Act, 1947, has been enacted for the benefits of the workmen and naturally all care and caution has been taken by the Parliament to make this remedy cheaper for this class of persons.

##. In some cases, justification is furnished for direct approach of the litigants to this court on the ground that Labour Court or the Industrial Tribunal takes long time to decide the matter. So delay in disposal of the matter by Labour Court of Industrial Tribunal, is a ground raised to justify direct approach to this court even in a case where efficacious and effective alternative remedy is provided under the statute to the

litigants. This is hardly a ground or justification or explanation for this approach of the litigants before this court directly in this class of cases. The facts of this case give complete answer to this ground of the litigant. This court is not in a position to stand to expectation of the litigant of speedy dispensation of justice. This petition is filed by petitioner in the year 1987 and it has come up for hearing in year 1999, i.e. after about 12 years. This is different matter that this petition came earlier on the final hearing Board. Otherwise it is a fact that in the court, special civil applications of the years 1980, 1981 an 1982 onwards are still pending. Before this court if the life of a litigant is said to be shorter than what it is here in this case.

##. Taking into consideration the totality of the facts of the case, in such matters, the rule is to first exhaust alternative remedy and this case certainly does not fall under any of the exemptions as carved out to this rule of exhausting alternative remedy by the litigant and when the complaint of the petitioner is of violation of provisions of Section 25-F of the Industrial Disputes Act, 1947, in retrenching him, this filing of writ petition directly by him is difficult to appreciate.

##. However, this Court cannot be oblivious of the fact that this writ petition has been filed in the year 1987. Not only this, this writ petition has been admitted after notice to the respondent and it is pending for the last twelve years. Though the learned counsel for the petitioner raised contention that now at this stage the petitioner may not be relegated to the alternate remedy, but it is not absolute rule that in such case, the party can not be relegated to the alternative remedy. However, in appropriate case this course can be followed by the Court. In a case where disputed question of facts are not involved, or the matter proceeds on the admissions of the parties, this course may be adopted by the Court but not as a rule or course. Yet there is another category of case where on the basis of pleadings of the parties prima-facie if the Court is satisfied that there is no merits in the matter, this rule can also be followed. These matters are to be taken at the first stage and while admitting the matter, what I feel and suggest that the Court is to record reasons for entertaining the writ petition as an exception to the rule of exhausting of alternative remedy. This is also not the case here. Be that as it may, as on merits, I do not find any case in favour of the petitioner, I do not consider it to be a fit case to relegate the petitioner to alternative

remedy.

##. From the facts of the case, I find that the services of the petitioner were terminated under the order dated 15th May 1987. This writ petition is filed by petitioner in the Court on 22nd May 1987 and it was placed in the Court for preliminary hearing on 25th May, 1987. From the order of this Court dated 17th June 1987, I find that the learned counsel for the petitioner made a statement that the order of termination of services is not served upon the petitioner and taking shelter of interim relief granted by this Court, it is stated that the respondent committed contempt of the order of the court. The petitioner was not knowing of the order of termination of his services passed by respondent is difficult to believe. In fact, this order would have been served upon him and he would have concealed this fact. Secondly the petitioner would have avoided receipt thereof. The petitioner has not produced on the record a copy of this order. From the prayer made by petitioner in the special civil application and the averments made in paragraph-2 of the special civil application, it is a clear and categorical admission of the petitioner that the day on which he filed this writ petition, he was well aware and knowing the fact that his services have been terminated by respondent. The petitioner knew about the order of the respondent under which his services were terminated and still he has not received that order or deliberately not produced the copy of the order on the record of the special civil application.

##. Very artistically, prayer has been made in the special civil application. The prayers made by petitioner in this special civil application are as under:

(A) ...be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, direction or order directing the respondent to treat the impugned action on the part of the respondent in not regularising the services of the petitioner and in terminating the services of the petitioner, as illegal, unjust, arbitrary, discriminatory, unconstitutional and non=est in the eye of law and be pleased to direct the respondent to treat the petitioner in continuous service of the respondent from the date of his initial appointment in the services of the respondent.

(b) Be pleased to direct the respondent to

accordingly regularise the service of the petitioner in the regular pay scale from the date of his initial entry in the service and to confer upon the petitioner all the consequential benefits of service such as fixation of pay, arrears of salary, leave, status, seniority etc. treating the petitioner in continuous service of the respondent from his initial entry in their service.

... ...

(11) Pending admission hearing and final disposal of this petition, Your Lordships may be pleased to restrain the respondent from terminating the services of the petitioner and permit him to discharge his duties and to pay him his regular salary accordingly in the regular pay-scale.

##. The petitioner is challenging the action of the respondent of terminating his services. His services were terminated under an order and unless the copy of that order is produced on the record of the special civil application, I fail to see how any relief could have been granted and can be granted by this Court to the petitioner. Unless that order is quashed and set aside no relief can be granted to the petitioner of his regularisation or continuation in services. When the services are terminated under an order, the copy of that order has to be produced on the record and the Court only thereafter can quash and set aside it. It is not case of the petitioner that after 15th May 1987, the respondent permitted him to work. Absence of this averment in writ petition makes it clear that the petitioner's services were brought to an end immediately. He has to take the copy of this order and then to file writ petition in this Court. Filing of writ petition without taking the order and till date not to produce the same on record deserves to be deprecated and it is deprecated. This writ petition deserves to be dismissed only on the ground that the impugned order of termination of services of the petitioner made by respondent has not been filed on the record. Without that order, this petition cannot be entertained nor that order can be quashed and set aside and as a result thereof, no relief whatsoever can be granted to the petitioner. Reference here may have to the decisoin of the Hon'ble Supreme Court in the case of Surndra Singh v. Central Government and Ors. reported in AIR 1986 SC 2166.

##. The claim of the petitioner in this writ petition is

for directions to the respondent to regularise his services. The petitioner's services have been brought to an end by a specific order. The petitioner is not in service of the respondent. Unless this order is declared to be illegal, arbitrary and quashed and set aside, I fail to see how such relief can be granted in his favour. As this order is not filed by petitioner on the record of the special civil application, in the absence of the same, its validity, propriety and correctness cannot be gone into and it cannot be quashed and set aside. On this ground, this relief also cannot be granted to the petitioner. In the case of H.P.Housing Board v. Om Pal and Ors. reported in (1997)1 SCC 269, the apex Court held that without holding that the termination of services of an employee was invalid, and that the employee continued in services, the Tribunal erred in giving directions regarding regularization of his services and payment of enhanced wages with effect from a particular date. The Hon'ble Supreme Court held:

> 8. On a perusal of the impugned order dated 31.7.1995 it appears that the Tribunal has finally disposed of OA No.43 of 1991 filed by the respondent and has given directions regarding regularisation of the said respondent without examining the legality of the termination of their services with effect from 1.12.1990. The question of regularisation of the respondent could arise only if the termination of their services with effect from 1.12.1990 was found to be invalid. The claim of the respondents in their application before the Tribunal that the termination of their services was illegal had been refuted by the Board in its reply. Without holding that the termination of the services of the respondent with effect from 1.12.1990 was invalid and that the respondent continued in service, the Tribunal was in error in giving directions regarding their regularisation and payment of enhanced wages to the respondent with effect from 1.1.1994 as per the judgment of this Court in Mool Raj Upadhyaya = 1994 Supp (2) SCC 316. The impugned judgment dated 31.7.1995 and the order dated 17.11.1995 cannot, therefore, be upheld and have to be set aside and OA No.43 of 1991 has to be remitted to the Tribunal for consideration of the question regarding validity of the termination of the services of the respondent with effect from 1.12.1990.

##. Though for these reasons it is not necessary for

this Court to go on and examine the validity, propriety and correctness of the order of termination of services of the petitioner but as this matter is of a workman, a low paid employee, I consider it to be appropriate to go on this question and decide the same. The petitioner stated that he was continuously working as a daily wager with respondent since 1983. Termination of his services was alleged to have been made in violation of provisions of Sections 25-F and 25-G of the Industrial Disputes Act, 1947. The petitioner admitted that he was working as a daily wager with the respondent. The respondent is Rajkot Municipal Corporation, Rajkot, and it is certainly a `State or an agency of `State' within the meaning of Article 12 of the Constitution of India. It is not the case of petitioner that the Corporation has no Regulations or Rules or byelaws for recruitment of drivers. Even if it is taken that there are no Rules, byelaws, Act or Resolutions of the Corporation providing for recruitment and other service conditions of the employees including drivers, Articles 14 and 16 of the Constitution of India are certainly applicable to the Corporation. It is not the case of petitioner that his daily wage appointment was made after inviting applications for open selection. I am constrained to observe that this daily wage appointments are made of the persons who are favourites or relations or friends of officers or employees of the Corporation. These appointments are manipulated and managed which is clearly borne out from the fact that the same are seldom made after inviting applications for open selection. In fact, this is the modus-operandi of the employees and officers of the Corporation to get their own favourites, relations, friends in employment by this back-door entry dehors the constitutional provisions and the recruitment rules. This daily wage appointment in fact, has now become by and large a mode of recruitment in the State. Permitting such appointments to continue for years together is another act of favouritism and nepotism of the officers of the Corporation so that this class of employees may go to the Court for regularization of their services. Not only this, if such appointments are permitted to be made and ultimately are ordered to be regularized, it will open the flood gates for favouritism, nepotism and corruption. Not only this, it will ultimately become a conduit pipe for regular appointment in the services. Recruitment to the services are to be made in accordance with the Rules, Regulations or Act or in accordance with the provisions of Article 14 & 16 of the Constitution of India. It is very very difficult for an ordinary citizen of the country to get daily wage appointment unless somebody is there to manage

for him or it has been made for some extraneous considerations. In fact, this daily wage, casual and temporary appointments in the Corporations or corporate bodies, or State or Municipalities or Panchayats, etc. are one of the reasons and cause for this heavy pendency of matters in the Court. If we go by statistics of pending service matters, I have my own reservation that substantial percentage of service litigation will be of this class of employees. What for this is permitted to be continued which ultimately results in favouritism, nepotism and corruption and in litigation in the Court. Daily wage appointments if are necessary in the Departments of the State Government or Corporation or Municipalities or Panchayats, etc., those are to be made under the Rules, that is to suggest, there must be recruitment rules to regulate this class of appointments and there must be a specific provision so that ultimately their services are being regularized. The system and practice which is prevalent in the State of Gujarat, its Departments, the Corporations, District Panchayats or other statutory or non statutory Corporations, has to be discontinued so that unnecessarily this class of persons may not suffer and their services may not start with litigation. I had an occasion to come across Resolution of the State Government dated 17th October 1988, whereunder the services of daily wagers were ordered to be regularized in many of the Departments of the State Government, meaning thereby, this has now virtually become another source of recruitment dehors the recruitment Rules and it is done by none other than a "Welfare State", who owes a duty and obligation to act in accordance with the provisions of the Constitution of India. Rule is to act contrary to the statutory rules as well as constitutional provisions and exception is seldom to act according to recruitment rules. It gives a heart burning and causes prejudice to the citizens who have no means or have no support. Article 16 of the Constitution of India confers fundamental right upon all the citizens of the country who are eligible for public appointment and to be considered for appointments to be made in the public services. By this mode of daily wage appointment and then to regularise those appointments, these provisions of the Constitution of India have been completely given good=bye. These provisions are there for flouting thereof and not for following it.

##. In the case of State of U.P. & Ors. v. Ajay Kumar, reported in (1997)4 SCC 88, the Hon'ble Supreme Court held as under:

3. The admitted position is that the

> respondent came to be appointed on daily-wage basis on 14.2.1985 as Class IV employee, Nursing Orderly, in the Medical College by the Medical Superintendent. When the respondent filed a writ petition in the High Court for his regularisation, the learned Single Judge pointed out that the respondent has not brought to the notice of the Court, any statutory rule under which the respondent could be regularised, on the basis of the service rendered by him as a daily-wage earner. Even the method of recruitment adopted by the Superintendent was not proper inasmuch as he did not call for applications. The Division Bench reversed the decision of the learned Single Judge and had given directions. It is now settled legal position that there should exist a post and either administrative instructions or statutory rules must be in operation to appoint a person to the post. Daily-wage appointment will obviously in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists. Under these circumstances, the Division Bench was clearly in error in directing the appellant to regularise the service of the respondent to the post as and when the vacancy arises and to continue him until then. The direction in the backdrop of the above facts is, obviously, illegal.

##. The daily wager is not a regular cadre on the establishment of the department concerned. The daily wage appointments are made when there is temporary increase of work or for temporary work and it continues so long as that work continues. The Apex Court, in the case of State of U.P. & Ors. v. Ajay Kumar (supra) has held that daily wage appointments are obviously in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists. Moreover, if such appointments are being regularised, then what this Court will do is to confirm illegal and unconstitutional action of the respondent. Under Article 226 of the Constitution of India, this Court will not perpetuate any illegality and unconstitutionality. Whatever the hard case may be but this Court may not be persuaded by it to give directions to the respondent to regularise services of daily wage employees dehors the Rules and constitutional provisions.

##. I fail to see how any of the constitutional right of the petitioner is being infringed on termination of his

services by respondent. Articles 14 and 16 of the Constitution of India though has been referred in the special civil application but it is totally misplaced and misconceived. These provisions are not attracted in the present case nor they are helpful to the petitioner in any manner.

##. The petitioner, in the special civil application, place in service to get relief prayed for, the provisions of Section 25-F and 25-G of the Industrial Disputes Act, 1947. Section 25-G of the Industrial Disputes Act, 1947, is not attracted in the present case as the petitioner has failed to show who are the persons junior to him were retained in services. So far as Section 25-F of the Industrial Disputes Act, 1947, is concerned, it is suffice to say that merely stating that he is continuously working since 1983 is hardly of any help to the petitioner. In paragraph-6(3) of the special civil application, the petitioner states, "the petitioner has been working continuously with the respondent-authority since 1983 and thus he has completed 240 days in a year". These are vague and bald pleadings. The petitioner, being a daily wager, it is very very difficult to accept that he would have been continuously working without any break. Be that as it may, his services were brought to an end under the order dated 15th May 1987 and the burden to prove that retrenchment has been ordered or made of the petitioner by respondent in violation of provisions of Section 25-F of the Industrial Disputes Act, 1947, heavily lies upon him and in this case he has totally failed to discharge the same. He has to prove as a fact by producing cogent and satisfactory evidence on record that he has completed 240 days' services in twelve calendar months immediately preceding 15th May 1987 and that is not the case here. It is not a case where the respondent has admitted that the petitioner had worked for 240 days in twelve calendar months preceding the date of termination of his services. The document produced by petitioner in the special civil application is of little help to him and on the basis of the same it is difficult to accept that he had worked for 240 days in twelve calendar months immediately preceding the date of his termination of services. The petitioner has failed to establish the very first requirement of the provisions of Section 25-F of the Industrial Disputes Act, 1947, and it cannot be taken to be a case where his services are terminated in violation of provisions of that Section. This is what, as stated earlier, a question of fact and for investigation and inquiry thereon, evidence has to be recorded, for which otherwise also, normally this remedy is wholly misconceived and illadvised.

##. As a result of the aforesaid discussion, this special civil application fails and the same is dismissed. Rule discharged. Interim relief, if any, granted by this Court stands vacated. No order as to costs.

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(sunil)